



Gulamhussein v Imperial Bank Limited (Under Receivership) & another (Civil Suit E044 of 2017) [2024] KEHC 12224 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E044 OF 2017
JK NG'ARNG'AR, J
OCTOBER 15, 2024**

BETWEEN

GULAMHUSSEIN F GULAMHUSSEIN PLAINTIFF

AND

IMPERIAL BANK LIMITED (UNDER RECEIVERSHIP) 1ST DEFENDANT

KENYA DEPOSIT INSURANCE CORPORATION 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion application dated 30/4/24 under Certificate of Urgency pursuant to Section 56 (2) of the *Kenya Deposit Insurance Act*, Section 1A, 1B and 3A of the *Civil Procedure Act*, Article 40 of *the Constitution* of Kenya, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law.
2. The Plaintiff/Applicant seeks that the court be pleased to order that the suit be continued for judgment and other subsequent proceedings thereto as against the 1st Defendant which is currently under liquidation, and that cost of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit sworn by the Plaintiff/Applicant on 18th June 2024 that the Plaintiff filed the instant matter as against the Defendants while the 1st Defendant was under receivership. That the suit was heard and the matter reserved for judgment on 18th December 2017. That delivery of the judgment has been pending since then till March 2024 when the Hon. Justice P. J. Otieno issued an order directing the Plaintiff to comply with the provisions of the *Insolvency Act* and the *Kenya Deposit Insurance Act* No. 10 of 2012.
4. The Plaintiff/Applicant stated that the law requires that since a company is placed under liquidation, no court proceedings shall continue unless with the sanction of the court. That while no prejudice will be occasioned to the Defendants should the reliefs sought are granted, the Plaintiff will suffer immense prejudice if this suit is not allowed to proceed as the 1st Defendant will be permanently wound up



through the liquidation process locking out the Plaintiff from getting any redress. That it is in the interest of justice that the reliefs sought are granted.

5. The Defendants/Respondents in the Replying Affidavit sworn by Billy S. Ubindi on 16th July 2024 averred that the 1st Defendant was placed under liquidation on 9th December 2021 via gazette notice number 13395 dated 8th December 2021. That the 1st Defendant's license was also revoked on 8th December 2021 via gazette notice number 13394. That on 18th April 2024, the court issued orders that parties comply with provisions of the [Insolvency Act](#) and [Kenya Deposit Insurance Act](#) before judgment can be delivered. That the Plaintiff is yet to comply with court orders issued on 18th April 2024 and has instead filed a Notice of Appeal dated 22nd April 2024 and the application dated 30th June 2024.
6. The Defendants/Respondents further stated that the application is misconceived, an abuse of the court process and maliciously drawn to mislead the court to interrupt the moratorium which has been placed over all the legal proceedings against the 1st Defendant who is under liquidation. That unless the Plaintiff/Applicant complies with the court orders and the provisions of the [Insolvency Act](#) and the [Kenya Deposit Insurance Act](#), the matter cannot proceed to judgment.
7. The application was canvassed by way of written submissions. The Plaintiff/Applicant through their submissions dated 20th August 2024 argued that the basis of the application is Section 56 of the [Kenya Deposit Insurance Act](#) which provides: -
 1. No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.
 2. No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the court.
8. The Plaintiff/Applicant submitted that the threshold in the above provision was well set out in the case of *Rashik Kumar Punja Shah & Another v Chase Bank Limited (in liquidation) & Another (2021) eKLR*. That the Applicant has sufficiently demonstrated and/or shown that he is deserving of the orders of the court by meeting the threshold above. The Plaintiff/Applicant also relied on the holding in the case of [Hexa Development Group Limited v Chase Bank \(Kenya\) Limited \(in liquidation\) \(Commercial Case E444 of 2020\)](#) (2022) KEHC 13301 (KLR) (Commercial and Tax) (28 July 2022) (Ruling). That the Plaintiff/Applicant's application is filed on the basis of the court order issued on 18th April 2024, and that this court has the jurisdiction to grant the prayers sought herein. The Plaintiff/Applicant prayed that the application be allowed with costs.
9. The Respondents in their submissions dated 11th September 2024 argued that the application herein is anchored on Section 56 (2) of the [Kenya Deposit Insurance Act](#) and that the sanction under this section is intended to protect the assets of the company under liquidation. That the Applicant has not demonstrated that the suit herein has merit as he still owes the bank a total of Kshs. 17,705,286. The Respondent relied on the holding in *Rashik Kumar Punja Shah & Another v Chase Bank Limited (in liquidation) & Another (2021) eKLR*. That the court has jurisdiction to grant leave under Section 560 of the [Insolvency Act](#) to a party seeking to commence or continue with the proceedings against a company under liquidation but only if such parties show exceptional circumstances. That in this case the Applicant has not shown exceptional circumstances whatsoever. The Respondent also relied on the holding in the case of *Owiti Otieno & Ragot Advocates v Mumias Sugar Company Ltd (under administration) (2020) eKLR*.
10. The Respondent further submitted on the cost of this application that by virtue of Section 27 of the [Civil Procedure Act](#), it is trite law that the issue of costs is a discretionary award that is awarded



to a successful party. The Respondent relied on the holding in *Morgan Air Cargo Limited v Evrest Enterprises Limited* (2014) eKLR and prayed that costs of this application be in the cause.

11. I have considered the Notice of Motion application dated 30th April 2024, the Replying Affidavit sworn on 16th July 2024, the Plaintiff/Applicant's submissions dated 20th August 2024, and the Defendants/ Respondents' submissions dated 11th September 2024. The issue for determination is whether the application is merited for grant of the orders sought.
12. Section 56 (2) of the *Kenya Deposit Insurance Act*, 2012 provides: -

“No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.”
13. The above section is very clear that leave of the court ought to be sought in advance before a suit is instituted or continued against an institution that has been placed under liquidation. The purpose of seeking leave was set out in the case of *Bougainville Estate Limited v Kenya Deposit Insurance Corporation* (sued in their capacity as Receiver Managers of Imperial Bank Limited (In Receivership) & 3 Others (2019) eKLR that: -

“ ... The essence of seeking leave to commence a suit, is to verify that the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation. The main aim is thus to create orderliness, decency and avoid a floodgate of actions which may involve some of the matters placed under supervision...”
14. It is not in dispute that 1st Defendant was placed under liquidation on 9th December 2021 via gazette notice number 13395 dated 8th December 2021 and its license also revoked on 8th December 2021 via gazette notice number 13394.
15. The court in its ruling dated 21st March 2024 and delivered by Hon. Justice Kizito on 18th April 2024 held that Section 54 (2) and 56 of the Kenya Deposit Insurance Corporation Act as read with Part IV of the *Insolvency Act* demand that no proceedings take place or continued with, without an order of the court first sought or obtained. That there was no indication in the court file that an order to that effect had been obtained. The court then directed parties to comply with the requirements of the *Insolvency Act* before the judgment can be delivered. The court further stated in the ruling that judgment is ready and has been ready since 18th December 2017 before the position of the 1st Defendant drastically changed when it was placed under liquidation by the 2nd Defendant.
16. In consideration of the above, this court finds that it is in the interest of justice that leave is granted for judgment to be delivered.
17. This court therefore makes the following orders: -
 - a. The Notice of Motion application dated April 30, 2024 is allowed.
 - b. The file herein shall be taken to Hon. Justice P. J. O. Otieno for delivery of the judgment and issuance of subsequent orders if need be.
 - c. Costs of this application be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF OCTOBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Umara Advocate for the Plaintiff

Atanacha Advocate for the Defendant

Court Assistant – Mr. Samuel Shitemi

